IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 173.

DULUTH AND IRON RANGE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

COUNTY OF ST. LOUIS, DEFENDANT IN ERROR.

REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

I.

It is first claimed by the defendant in error that the Duluth and Iron Range Railroad Company did not have a valid exemption for the term of five years from the time the lands were conveyed by patent from the State to the railroad company.

We first desire to correct some statements inadvertently made by the counsel for the defendant in error. He says, on page 6 of the brief, that the original grant of 1875 was enlarged by the act of 1885 so as to include lands in other

counties and to provide for a more advantageous method of selection. In this the counsel is in error. The act of 1885 was never accepted by the railroad company, and it has never made any claim under its provisions. As construed by the courts and by the State officers, the company's rights are dependent upon the act of 1875 and the act of 1883, which we shall hereafter call attention to.

This was the finding of the supreme court of Minnesota in the case of Minneapolis and St. Cloud Railroad Company *vs.* The Duluth and Winnipeg Railroad Company, defendant, and Duluth and Iron Range Railroad Company, intervenor (45th Minnesota, p. 104). At page 110 of the opinion the court said :

"We turn now to the grant to intervenor. It does not claim anything (it is not necessary that it should) under the act of March 10, 1885, which was enacted after the adoption of the constitutional amendment of 1881, relating to the disposition of swamp lands."

The grant of 1875 was, with all the conditions therein, offered to the railroad company and accepted by it. The limited exemption from taxation was a part of the consideration moving from the State to the railroad company which induced it to accept the grant and construct the road. The State can no more recall this privilege, exemption, or franchise than it can recall the grant of lands. These propositions have passed into judicial history so many times that we are now powerless to add anything to this argument.

It will be noted that the act of 1875, section 2 (Record, p 9), required the governor of the State, when duly notified of the completion of the road, to have the same exam-

ined by sworn commissioners, and upon their report of its completion, as provided by the act, to cause the lands to be conveyed. In 1883 the legislature passed another act authorizing the railroad company to change the northern terminus of its road, waived the default of the railroad company, imposed new conditions, and extended the time of construction and, among other things, provided:

"Hereby expressly reserving and saving to said corporation all grants, property rights, privileges and immunities in said legislative act approved March 9, 1875, provided."

Section 3 of the act required the corporation to file an acceptance of the act within six months in the office of the secretary of state, by resolution of its board of directors, approved by its stockholders, and the act provided:

"*Upon the filing of this resolution the said corporation shall became entitled to the benefits of the provisions of this act, and the same shall become obligatory*" (Rec., pp. 10, 11).

In this case the court found the railroad company had thus accepted the provisions of this act; that it constructed its road and complied with all the terms and conditions of the grants (Rec., pp. 11, 12).

In 1897 the legislature passed an act attempting to forfeit the grant of the State for pretended failure to comply with the terms of the granting act. Thereupon the State of Minnesota brought suit to forfeit the grant, and the trustee of the mortgage of the Duluth and Iron Range Railroad Company brought a suit to enjoin the State officers from selling the lands. The two cases were heard together in the United States circuit court of the district of Minnesota, and Judge Lochren held that the railroad company had complied with

the acts of 1875 and 1883, and that the State was powerless to forfeit the lands (State of Minnesota *vs.* Duluth and Iron Range Railroad Company, 97 Fed. Rep., p. 73; p. 359 of opinion).

The provision as to the exemption from taxation of the lands so contained in the granting act was one of the provisions thus accepted and relied upon, on the faith of which the State obtained the construction of the railroad.

This case, therefore, is easily distinguished from the cases of Tucker *vs.* Ferguson (22 Wallace, 527) and West Wisconsin Railroad Company *vs.* Board of Supervisors of Trempeleau County (93 U. S., 595).

We have sufficiently distinguished Tucker *vs.* Ferguson in the former brief. All we desire to say here is that the counsel misapprehends our position in relation to the right of the State to exempt these lands.

We do not deny that the State might have provided for the taxation of these lands after their conveyance to the railroad company. It was only prohibited from taxing them while the title remained in the United States and the trust was unexecuted. It was so held in Tucker *vs.* Ferguson. The court there said:

"Upon general principles she could not tax the land while the title remained in the United States nor while she held them as trustee of the United States, which, in view of the law, was the same thing."

But this is probably immaterial, because while the title remained in the State, of course, the provisions of the constitution of Minnesota as to taxation did not apply to them; and this being the case, it is our claim that the State had

the power in the execution of that trust to appropriate the lands for internal improvements, and to make the grant valuable could, as a condition of that grant, exempt them from taxation in the hands of the railroad so undertaking the public improvement.

Another distinction in Tucker *vs.* Ferguson is that the exemption which was called in question in that case was not in the granting act. It was not an inducement to the acceptance of the grant as it had been accepted and its terms fixed by a previous law.

The exemption contained in the granting act was not violated. The court said:

"The State, in the act accepting the grant, agreed *sua sponte* to forbear to tax for seven years. There is no complaint that this stipulation has been violated."

The other exemption was made afterwards and was a mere gratuity, for which there was no consideration.

In the case of West Wisconsin Railroad Company *vs.* Trempeleau County the court simply followed Tucker *vs.* Ferguson. In that case the provision exempting the lands was made after the grant of the lands and was not a part of it. In addition to that the constitution of Wisconsin, when this grant was made, contained a provision authorizing the legislature to revoke all corporate franchises and privileges which it might grant. A reference to this case in the supreme court of Wisconsin (35 Wis., 257) will substantiate our position. The court there said (p. 272 of opinion):

"The legislature might resume the right of taxation which it had relinquished within the power to alter and repeal the franchises and privileges of corporations."

II.

We beg leave to submit a few suggestions as to the effect of the constitutional amendment of 1871. We confidently assert that this amendment was not intended as a ratification of previously invalid gross-earnings tax laws or as a grant of authority to pass such laws in the future. Its language is not that of a ratifying act. By prohibiting the repeal or amendment of any law theretofore or thereafter enacted providing for a gross-earnings tax it presupposed the validity of such laws. If it recognized the validity of such laws in existence at the time of the adoption of this amendment, it equally recognized the existence of the power of the legislature under the constitution of 1858 to pass such laws thereafter. If such laws were valid before 1871, then after 1871 they were not passed by virtue of any power granted by that amendment. The amendment contained no words of grant.

We have seen that we have a right to look to the history of legislation, the previous condition of the law, and the objects to be accomplished by a legislative or constitutional provision in order to determine the proper construction to be placed upon its provisions. Of course this only applies where the language is ambiguous. The language of the amendment here is not ambiguous. It means just what it says in plain terms, that the gross-earnings tax laws shall not be amended or repealed without the consent of the majority of the electors. That is all it provides for and all it means. There was not at the time of its adoption any question as to the validity of such laws. Most of them had been passed by the territorial legislature. The Parcher case, holding

them irrevocable contracts, had been decided two years before. There was no call for such an amendment, no agitation of the question, no doubts as to the validity of such tax laws existed in the legislative, the executive, or the judicial branches of the Government, and yet the counsel for the appellee would have us believe that in this state of public sentiment the people were so solicitous of ratifying these invalid tax laws that this constitutional amendment was proposed and adopted.

We say it was a recognition of the validity of such laws and of the power in the legislature to pass such laws under the constitution of 1858, rather than a ratification, and that it was passed by the legislature and adopted by the people with the full belief that such laws were valid and with the intention of preventing any change in them without the consent of the majority of the electors.

We believe that a careful and thoughtful examination of the decisions of the supreme court of Minnesota will show that it was in this light that the court used the language in the various cases where this amendment is mentioned.

The first case in which this constitutionai amendment was considered was City of St. Paul *vs.* St. Paul and Sioux City Railroad Company, 23 Minnesota, 469. The court was there considering the question of the validity of the act of 1864 granting additional lands to the territorial roads and changing the terms and conditions of the contract for taxation. Upon this subject the court said:

"This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as authority, both by

the legislative and executive departments of the State government; but by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by law, ratified by a vote of the electors of the State."

Mark this language. The court here held, as it has always held until the decision in the Stearns case, that the legislature had power, under the constitution of 1858, to pass such laws, and simply held that by the constitutional amendment of 1871 the people placed it beyond the reach of the legislature with the consent of the railroad companies to amend or repeal such laws, except when ratified by the electors. This is what the constitutional amendment provides for, and what we claim was intended by its adoption.

Subsequent to the case we have just quoted the subject came before the court in Marr *vs.* Luther, 56th Minnesota, 156.

Most of Justice Mitchell's opinion is a presentation of the reasons and arguments for holding the gross-earnings tax laws valid under the constitution of 1858. He considered the amendment of 1871 as a recognition of such power and not as a ratification of invalid laws.

After reviewing the history of the legislation and stating that the legislature had invariably assumed that it had the power to pass such laws, both before and after the constitution of 1858, he used this significant language in relation to the amendment:

"This language must have been selected and this amendment adopted with reference to the existing legislation, and the general legislative policy to which we have referred; as read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this

commuted system of taxation of railroad property and lands; *and of the legislative power to enact such laws in the future.*"

This language was carefully selected. The decision was one of many on this question. The court certainly was not reviewing the legislative policy in reference to gross-earnings taxes in order to determine that the constitutional amendment of 1871 was a ratification act. The power of the people by a constitutional amendment to ratify gross-earnings tax laws was plenary. What the court was so carefully considering was whether such laws were valid under the constitution of 1858 and whether the constitutional amendment of 1871 recognized that validity, and the language of the opinion cannot be misunderstood. It holds that this was a recognition of the power in the legislature to enact such laws in the future. That power was not granted by the amendment of 1871, but it was inherent in the legislature and not restricted by the constitutional provision of 1858.

We say, therefore, that if the power did exist then the contracts of the legislature after 1871 stand in the same position as those before, because it is only on the theory that the amendment of 1871 was a ratification of invalid laws and a grant of power to pass such laws that the legislature had the right to repeal and amend its contracts.

There is no language in this constitutional provision expressly reserving the right to repeal or amend gross-earnings tax laws. If it was intended to reserve in the legislature the right to amend or repeal its contracts, it applies with equal force to laws passed before as well as after 1871, to Territorial as well as to State enactments. We think it will hardly be presumed that it was the intention of the people to reserve the right to amend and repeal the solemn contracts

of the Territory, which had been previous to that time held in the Parcher case, irrevocable.

The language of the amendment, however, applies to all gross-earnings tax laws. It makes no distinction. The trouble is that in the decision in the Stearns case the court has departed from its construction of this amendment in Marr *vs.* Luther and in the other cases, and has for the first time held the tax laws were absolutely void prior to 1871, and that the amendment of 1871, instead of being a recognition of the power to pass such laws, was a ratification of invalid laws, and by inference, therefore, reserved the right to amend and repeal them. We submit this is not a proper construction of the amendment, and not the construction previously placed on it by the same court.

Counsel for the defendant in error cites the Pennsylvania College case, 13th Wallace, 190. A casual inspection will show that this case is not in point. The legislature of Pennsylvania passed a charter for a college at Canonsburg, known as Jefferson college, and provided in the act that the constitution should not be altered by any ordinance or by-laws of the trustees of the college, and only by the legislature. It is perfectly evident, therefore, that only the legislature could change it. Furthermore, the college consented, and it was held that persons holding scholarships which would not be affected by the change in the law could not object thereto. This case has no bearing whatever upon the proper construction of the constitutional amendment in question.

Respectfully submitted.

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